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COURT OF CRIMINAL APPEALS
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No. PD-0035-18
In the
Texas Court of Criminal Appeals
At Austin

◆

No. 14-16-00242-CR
In the Court of Appeals for the
Fourteenth District of Texas
at Houston

◆

FREDDY GARCIA
The appellant
V.
THE STATE OF TEXAS
Appellee

◆

STATE'S BRIEF ON DISCRETIONARY REVIEW

◆

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ORAL ARGUMENT NOT PERMITTED

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Honorable Ruben Guerrero, Presiding Judge of the 174th District Court

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

This Court has not permitted oral argument in this case.

STATEMENT OF THE CASE

The State charged the appellant with aggravated sexual assault of a child, and the jury found the appellant guilty (CR—14, 121; 5 RR 29). The State alleged that the appellant had been previously convicted and the jury found the enhancement true (CR—63; 6 RR 4; 7 RR 4). The trial court sentenced the appellant in accordance with the jury's verdict to 45 years in the Institutional Division of the Texas Department of Criminal Justice and a $10,000 fine (CR—129; 7 RR 4). The appellant gave timely notice of appeal, and the trial court certified that he had the right to appeal (CR—132, 136-39).

STATEMENT OF THE PROCEDURAL HISTORY

On appeal, the appellant raised two issues: (1) a violation of his right to a speedy trial and (2) that the State failed to make a timely election to a specific offense. On July 20, 2017, a panel of the Fourteenth Court of Appeals overruled the speedy trial issue, but sustained the election issue and reversed the appellant's conviction. *See Garcia v. State*, 14-16-00242-CR, 2017 WL 3089945, at *2 (Tex. App.—Houston [14th Dist.] July 20, 2017 no pet. h.).

On July 31, 2017, the State filed a motion for rehearing regarding the harm analysis the court of appeals conducted on the election issue.[1] On December 14, 2017, a panel of the Fourteenth Court of Appeals, overruled the State's motion for rehearing, withdrew its prior opinion, and substituted a new opinion still sustaining the election issue and reversing the appellant's conviction. *See Garcia v. State*, 14-16-00242-CR, 2017 WL 6374691 (Tex. App.—Houston [14th Dist.] Dec. 14, 2017, pet. filed).[2] This Court granted the State's petition for discretionary review.

ISSUES PRESENTED

1. **Is the constitutional harm standard the proper test for harm when there was a mere delay in the election versus no election at all and the jury is charged on a specific incident?**

2. **How specific must the factual rendition of a single incident in the jury charge be to serve the purposes the election requirement?**

[1] *See* State's Motion For Rehearing.

[2] The court of appeals' opinion was recently published in the Southwest Reporter 3d. *See Garcia v. State*, 541 S.W.3d 222 (Tex. App.—Houston [14th Dist.] 2017, pet. granted). At the time of the filing of the State's brief, however, no page numbers or pin cites appear to reference specific portions of the opinion; therefore, the Westlaw version has been attached as an appendix for this Court's reference. *See* Appendix A.

STATEMENT OF FACTS

In 1986, Jane[3] moved from Mexico to Houston to live with her mother, two half-brothers, and the appellant, her step-father, when she was 11 years old (3 RR 115). Her mother often left Jane alone with the appellant and her brothers (3 RR 117-18). The appellant sexually assaulted Jane on multiple occasions in different manners; he started by having Jane rub his head and touching Jane on her privates (3 RR 121-22). He told Jane not to tell her mom (3 RR 122). The appellant continued to touch Jane inappropriately on her vagina and he made her touch his penis (3 RR 124-25).

The incidents escalated and the appellant eventually raped Jane (3 RR 122-26). The appellant called Jane into the bathroom, where he stood near the sink; the appellant made her take off her clothes and forced his penis into her vagina (3 RR 126-28). Jane bled from the incident; it was her first ever sexual contact (3 RR 127-28). The appellant threatened to kill her or her mother if she told anyone (3 RR 128). Jane was scared of the appellant (3 RR 128).

After the rape, the appellant continued to touch Jane inappropriately (3 RR 129-133). He would call Jane into his room and force her to masturbate him by grabbing her hand and placing it on his penis (3 RR 132-33).

[3] The pseudonym "Jane" will be used for the victim in this case.

Finally, in August 1987, Jane's mother found out about the abuse (3 RR 134-35). That day Jane's mother left for work, leaving Jane alone with the appellant and her brothers (3 RR 136). The appellant followed Jane to her room, forced her to take off her clothes, and took his pants down when Jane's mother walked in (3 RR 134-35). Jane's mother kicked the appellant out of the apartment (3 RR 136-37).

On August 17, 1987, Jane and her mother reported the assaults to the Houston Police Department (HPD) (3 RR 39-42). Jane received a sexual assault exam, and the results were consistent with the history she provided the doctors (3 RR 55, 67). Jane's rape kit was analyzed at the crime lab and sperm was detected on the sample from Jane's vagina smear (4 RR 20-22).[4] *See* (St. Ex. #8, 9). Elvia Landa, an HPD Child Abuse Investigator, investigated the case and found Jane credible (3 RR 84). The appellant was arrested and charged with one act of Aggravated Sexual Assault of a Child by penetrating Jane's vagina with his penis (3 RR 86-89).

The appellant made bond in 1987, received a court setting, but failed to appear; repeated attempts were made to arrest him (3 RR 43, 46, 49-50; 4 RR 6-15). *See* (St. Ex. #12). In 2014, an investigator with the Harris County District Attorney's Office Fugitive Apprehension Unit located the appellant living in

[4] At the time the rape kit and samples were tested DNA analysis was not conducted on these types of samples (4 RR 22-26). The record reflects that the samples were later destroyed (4 RR 27-78).

North Carolina under another name; he was located, arrested, and returned to Harris County (4 RR 54-55, 59, 64-66).

Facts Regarding Issue on Appeal

During trial, the State's evidence revealed the appellant possibly committed two aggravated sexual assaults against Jane, which were referred to as the "bathroom" incident and the "bedroom" incident (3 RR 99-146). *See Garcia*, 2017 WL 6374691 at *7-10. While Jane only described penetration during the bathroom incident, Landa testified during cross examination, that she thought Jane had told her that the appellant had penetrated Jane during the bedroom incident, though she was unsure (3 RR 99-100, 109-36, 142-46). *See id*.

At the end of the State's case in chief, the appellant requested that the State elect the offense it intended to seek a conviction on (4 RR 69). The State declined to do so and stated it would make its election at the close of all evidence (4 RR 69). The trial court denied the appellant's request and agreed that the State should make its election at the end of the trial (4 RR 69-70).

At the end of all evidence, the appellant again approached the bench regarding the issue of election (4 RR 111). The following exchange occurred:

> [DEFENSE COUNSEL]: If you want to excuse the jury, I have one thing just about the election.
>
> THE COURT: The what?
>
> [DEFENSE COUNSEL]: The election, the State's election issue.

THE COURT: State's election issue –

[DEFENSE COUNSEL]: As to which offense they're moving forward on. Because that's going to play into the jury charge.

THE COURT: All right. We'll excuse the jury and do that.

(4 RR 111). After the jury left, the trial court stated, "All right. Talk to me about the election." (4 RR 112). The State responded that they were "figuring out how to word the description of the specific incident [it was] electing to go forward on." (4 RR 112-13). The State indicated that it would "forward a copy [of the description]" to the appellant "to make sure there [were] no objections to [it]" (4 RR 112-13). The appellant made no more objections regarding the State's need to elect and no further requests for an election.

The application paragraph of the jury charge included specific language regarding the "bathroom" incident, stating:

> Now, if you *unanimously* find from the evidence beyond a reasonable doubt that *on or about* the 16th day of August, 1987, in Harris County, Texas, the defendant, Freddy Garcia, did then and there intentionally or knowingly cause the penetration of the female sexual organ of [Jane], a person younger than fourteen years of age and not his spouse, by placing his sexual organ in the female sexual organ of [Jane], *while inside a* ***bathroom*** *inside an apartment [Jane] shared with her mother, brothers, and the defendant*, then you will find the defendant guilty of aggravated sexual assault of a child, as charged in the indictment.

(CR—113) (emphasis added). The jurors were further instructed to certify their verdict only after they "unanimously agreed upon a verdict" and were instructed

that they were not bound by the "on or about" date (CR—113-115). The appellant neither objected to the charge nor asked for any additional language regarding an election (CR—113; 5 RR 7-10).

SUMMARY OF THE ARGUMENT

An untimely election at the end of all evidence, prior to the court's charge, can still serve three of the four purposes behind the election requirement. Whatever harm the appellant suffered from the untimely election in this case related only to notice, and as such should be assessed under a non-constitutional harm standard. Regardless, the appellant was not harmed by the election error when testimony regarding multiple incidents of abuse was admissible, the jury was charged on a specific offense, and the appellant's defense was the same across the board.

Furthermore, the charged "on or about" date does not undermine other offense-specific language utilized to instruct the jury on the State's elected offense. The language used to instruct the jury on the elected offense should be the lowest amount of data points established by the evidence that set the elected offense apart from the other offenses described by the evidence.

FIRST GROUND FOR REVIEW

Is the constitutional harm standard the proper test for harm when there was a mere delay in the election versus no election at all and the jury is charged on a specific incident?

When one particular act of sexual assault is alleged in the indictment and more than one incident of that same manner and means of sexual assault is shown by the evidence, "the State must elect the act upon which it would rely for conviction" when properly requested by the defense. *See Phillips v. State*, 193 S.W.3d 904, 909 (Tex. Crim. App. 2006). The State must elect at the close of its evidence, upon a timely request by the defense; however, the defense may forgo an election and instead, jeopardy bar the State from trying any offense submitted during trial. *See id*; *Owings v. State*, No. PD-1184-16, 2017 WL 4973823, at *5 (Tex. Crim. App. Nov. 1, 2017) (not yet released for publication)); *see also Owings*, 2017 WL 4973823 at *9 ("[A] defendant is able to opt for an election—or not—purely as a matter of strategy.").

An election serves four purposes: (1) protecting the accused from the introduction of extraneous offenses; (2) minimizing the risk that the jury might choose to convict, not because any one crime was proved beyond a reasonable doubt, but because all of the incidents convinced the jury that the defendant was guilty; (3) ensuring jury unanimity; and (4) providing notice to the defense of the particular offense the State intends to rely upon for prosecution and afford the

defendant an opportunity to defend. *See Dixon v. State*, 201 S.W.3d 731, 733 (Tex. Crim. App. 2006); *Owings*, 2017 WL 4973823 at *5.

In this case, the indictment alleged an offense describing vaginal rape and the record reflects evidence of possibly two incidents of vaginal rape—the bathroom incident and the bedroom incident (CR—14; 3 RR 109-146).[5] The record reflects that the appellant made a timely request for an election at the close of the State's case; however, the trial court erroneously denied this request and instead, the record reflects that the State made its election at the close of all evidence (CR—113; 4 RR 69, 111-13).[6] The appellant appealed the trial court's denial of his timely request for the State to elect an offense at the close of the State's case in chief. (App'nt Orig. Brf. 1-12). This was the only issue regarding election error before the court of appeals. Therefore, the question becomes: was the appellant harmed by the delay in the election?

I. It can be reasonably inferred from the record that the State made an election, albeit untimely.

Contrary to the court of appeals' analysis, it can be reasonably inferred from the record that the State informed the appellant of its election prior to the reading of the court's charge. *See Garcia*, 2017 WL 6374691 at *10. The record reflects that

[5] The court of appeals found that although Jane only testified about one rape, testimony from Landa could have been construed as a second penetrating incident. *See Garcia*, 2017 WL 6374691 at *7-10.

[6] *See also* (App'nt Orig. Brf. 11) (noting that the "application paragraph limited the jury to one single alleged sexual assault" and notes that "unanimity was not an issue.").

after the appellant's final request for the State to elect, a discussion occurred between the parties on the record where in response to the trial court's inquiry about an election, the prosecutor indicated he was creating charge language and would submit the language chosen to the appellant prior to sending to the court reporter (4 RR 111-13). The appellant made no further requests regarding which offense is elected and did not subsequently object to the court's charge, specifying the "bathroom" incident (CR—113; 4 RR 111-13; 5 RR 7-10). Thus, it can be reasonably inferred that an election had been made off the record, that they were creating charge language to reflect that election, and that the appellant was aware of the State's elected offense prior to the reading and submission of the court's charge.

The court of appeals found, however, that this colloquy "confirms that the State made no election at the close of all evidence when both sides rested." *See Garcia*, 2017 WL 6374691 at *7-10. But in making this finding, the court inferred a requirement that an election must be pronounced on the record. While it may be the better practice to do so, the court pointed to no authority for this holding.

The purpose of requiring the State to make an election at the close of its case in chief is to provide notice to the defendant so that he can put forward a defense, tailor a limiting instruction for the court to charge the jury, and argue to the jury the evidence that challenges some or all of the elements of the State's case. *See*

Phillips, 193 S.W.3d at 912. And it is clear from the context of the record that the parties were aware of the specific offense elected. *See generally Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) (looking to the context of the objection and the shared understanding of the parties at the time to determine whether an objection at trial preserved error for appellate review). Therefore, the purpose behind the requirement was met.

Moreover, there is no requirement that an election be pronounced in front of the jury. A trial court speaks to a jury through its instructions and, absent evidence to the contrary, a jury is generally presumed to have followed the trial court's instructions. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005); *see also Owings*, 2017 WL 4973823 at *8 (noting no indication from jury they were not unanimous about which incident). Outside of the jury instructions, there is not a requirement to inform a jury of the State's election earlier, and a jury should not be required to discern the legal effect of any pronouncement the State may make regarding an election at an earlier juncture. *See Duffey v. State*, 326 S.W.3d 627, 632 (Tex. App.—Dallas 2009, no pet.) (finding State's oral announcement of election not sufficient to inform jury; requiring jury be charged on election). Accordingly,

the record reflects the State made an election, though untimely.[7] *See Owings*, 2017 WL 4973823 at *8.

II. The appellant was not harmed by the election error when the jury was charged on a specific offense and the appellant's defense was the same across the board.

The Fourteenth Court of Appeals held that there is "no meaningful distinction to be drawn on this record between a failure to elect versus a late election." *See Garcia*, 2017 WL 6374691 at *10. The court focused on language from this Court's holding in *Phillips* that a "jury charge cannot be a *de facto* election" to find that the late election in the present case equated to harmful error. *Phillips*, 193 S.W.3d at 912. But the court of appeals' conclusion is at best an overbroad reading of *Phillips*; the court conflates the error analysis with the harm analysis and essentially holds that any delay in providing an election is automatic harm, something this Court has never held. *See Garcia*, 2017 WL 6374691 at *8-10 (citing *Phillips*, 193 S.W.3d at 912 and *Owings*, 2017 WL 4973823, at *5 n. 8).

In *Phillips*, this Court found that an election made only in a jury charge (when requested at the end of the State's case) still constitutes election *error* because the election would be untimely. *Phillips*, 193 S.W.3d at 912. This Court

[7] Even if this Court finds that there was no election made, the factors weigh against finding harm due to the fact that the complainant only testified about one act, the jury was charged on that specific offense, and that the appellant's defense was the same across the board. *Cf. Owings*, 2017 WL 4973823 at *8.

pointed to the fourth purpose of the election requirement that a defendant must be made aware of the crime he is defending against at the end of the State's evidence if he so requests. *Id.* Thus, it was a question of *error* rather than *harm* and this Court went on to conduct a separate harm analysis after finding error.[8] *See id.*

Here, the question regarding whether the appellant was harmed from the election error was: Did the delay in the election from the end of the State's case in chief to the end of the guilt-stage prejudice the appellant? Which necessarily raises the question: Had the State properly elected at the end of its case in chief, how would it have differed from the election ultimately made, *i.e.* instructing the jurors that in order to convict they must find that the penetration occurred in the bathroom? And contrary to the court of appeals holding, *this* is the meaningful distinction between error from a failure to elect and error from a delay in providing an election. Moreover, because this is a procedural rather than a substantive error, it raises the question of whether the constitutional harm standard should still apply in this situation.

A delay in election may not provide what a timely election does in terms of notice, but the charge given, coupled with Article 38.37, can prevent the kinds of harm this Court discussed in *Dixon*. *See id*; *Dixon*, 201 S.W.3d at 736; *see also* TEX. CODE CRIM. PROC. ANN. art. 38.37 (West). Because an election was ultimately

[8] The *Phillips/Farr* opinions do not contain what or what was not included in the court's charge for comparison purposes. *See Phillips*, 193 S.W.3d at 912.

made in this case and the jury was charged on a specific incident, the concern on harm becomes the notice prong: was the defendant provided an adequate opportunity to defend? *See Phillips*, 193 S.W.3d at 909.

The first purpose of the election requirement, protecting the accused from the introduction of extraneous offenses, is not frustrated in this case because Article 38.87 permits the admission of evidence of extraneous offenses committed by a defendant against a child victim. TEX. CODE CRIM. PROC. ANN. art. 38.37 (West); *see also Owings*, 2017 WL 4973823 at *6. Such evidence would be admissible regardless of whether the State elected at the close of its case or at the close of all evidence. *See id.*

The second and third purposes, minimizing the risk of adding offenses together to meet burden and unanimity requirements, are likewise not at issue because they concern a jury's consideration of the evidence. *Phillips*, 193 S.W.3d at 911. Here, the jury was instructed to make its decision on a specified offense—the bathroom incident.[9] There is no concern that the jury added up the offenses or was not unanimous because it was instructed that to find the appellant guilty it must *unanimously* agree that he committed sexual assault on Jane *in the bathroom*, the distinguishing fact between the offenses submitted (CR—113). Moreover, the

[9] Notably the appellant acknowledged that jury unanimity was not an issue due to the application paragraph and the limiting instruction in the court's charge. (App'nt Orig. Brf. 11).

jurors never alerted the court regarding a confusion of the issues or that they were not unanimous. *See Owings*, 2017 WL 4973823 at *8 (noting lack of notes sent out by the jurors indicating confusion of the issues or disputes over testimony). Furthermore, the court provided a limiting instruction in the court's charge regarding extraneous offenses (CR—114). *See Phillips*, 193 S.W.3d at 911 n. 40 (noting a limiting instruction given at the time evidence admitted could conceivably render the lack of an election harmless).

The court of appeals failed to appreciate that the jury charge alleviated, rather than exacerbated, the harm from a late election by narrowing the jury's consideration of incidents to a characteristic that described only one incident. *See Allen v. State*, 14-15-00115-CR, 2016 WL 3635863, at *6 (Tex. App.—Houston [14th Dist.] July 7, 2016, no pet.) (mem. op., not designated for publication) (harmless error for failure to elect when jury charge ensured unanimous verdict as to both acts alleged). Additionally, the evidence regarding the bedroom incident was thin—Jane only testified about penetration in the bathroom and Landa was not sure that Jane had been penetrated in the bedroom, stating "I think so" in response to questioning (3 RR 99-146). Thus, the second and third purposes for an election were not frustrated.

Accordingly, the only concern regarding harm for an untimely election is the fourth purpose: how the late notice affected the appellant's ability to defend his

case. *See Phillips*, 193 S.W.3d at 912-13 (finding a "defendant must be made aware of the exact crime he is defending against to ensure notice at the end of the State's evidence.").

The record reflects that the appellant was not deprived of adequate notice in order to prepare a defense. The appellant was aware of the charges and allegations against him (CR—14). *See Phillips*, 193 S.W.3d at 912 (noting the purpose of election is the defense "must be made aware of the exact crime he is defending against"). Prior to trial, the State filed notice of its intention to use extraneous offenses, and the appellant acknowledged he received such information (CR—58-61, 88-90).[10] *See Dixon*, 201 S.W.3d at 736. The appellant never objected or alerted the court that he was surprised by any of the allegations, including the bathroom incident.

The appellant's defense was the same character and strength across the board for all acts alleged. The appellant denied committing *any* of the alleged acts and asserted the theory that Jane fabricated the offenses because she did not like him (5 RR 15-23). The appellant presented testimony from his son and daughter that he had been strict with them growing up and that Jane did not like him (4 RR

[10] The appellant filed "Defendant's Motion to Required Election By State" in which he acknowledged receiving the notice of extraneous offenses and that the State was not bound to the "on or about" date.

97-98, 106). And he emphasized the lack of scientific evidence, missing evidence, and poor police investigation throughout trial (5 RR 15-23).

The appellant did not distinguish between the offenses, have an alibi to one offense, or argue that one offense was impossible. The appellant's defense would have been the same regardless of the act that the State elected to pursue. It is unlikely that had the State made its election at the appropriate time that the appellant would have changed his defense. It is also unlikely with a timely election that the appellant would have admitted to assaulting Jane in the bedroom but denied the bathroom incident. Moreover, it is reasonable to assume that the appellant would have likely presented any offense-specific defense, if he had one, to attack Jane's credibility to all the allegations.

This Court has consistently held that this final purpose is not frustrated when a defendant puts forward a blanket denial of offenses. *See Owings*, 2017 WL 4973823 at *8 (finding no risk that the appellant was deprived of adequate notice of which offense to defend against when appellant made blanket denial of offenses); *Cosio v. State*, 353 S.W.3d 766, 777-78 (Tex. Crim. App. 2011) ("The jury was not persuaded that [the appellant] did not commit the offense or that there was any reasonable doubt. Had the jury believed otherwise, they would have acquitted [the appellant]...").

The court of appeals distinguished this Court's recent analysis in *Owings*, noting the facts there included multiple instances of the same offense. But this is a distinction without a difference. In *Owings*, the complainant, like Jane, described different locations for repeated sexual assaults and, like the present case, they contained some differences. *See Owings*, 2017 WL 4973823 at *7. This Court recognized, however, that the concern regarding notice is how the defense might have differed and when the defense is a blanket denial of *any* offense, the defense is not inhibited by the error. *Id.* (noting although victim's testimony included some differences "it is highly unlikely that any juror voted to convict the appellant because they believed that one of those acts occurred and the acts in the appellant's bedroom did not."). Additionally, *Owings* dealt with error from the failure to elect at all; it is hard to reconcile holdings that a complete failure to elect is harmless while a delay in election is harmful. *Cf. Id.* at *8.

Moreover, the appellant has not indicated that he was adversely affected by not receiving notice of an election at the close of the State's case in chief. *See Reza v. State*, 339 S.W.3d 706, 716-17 (Tex. App.—Fort Worth 2011, pet. ref'd) (finding no harm under fourth consideration; noting the appellant never indicated defense adversely affected about not receiving election prior to presenting case).

The case came down to the jury believing Jane or the appellant. *See Owings*, 2017 WL 4973823 at *8; *see also Taylor v. State*, 332 S.W.3d 483, 493 (Tex. Crim. App. 2011) ("The defensive theory was that no sexual abuse occurred at any time … the jury either believed appellant or believed the victim."). Therefore, the appellant was not adversely affected by receiving the election late rather than at the end of the State's case in chief. *See id.* Because the purposes behind the election requirement were not frustrated in this case, the court of appeals erred in finding harm.

III. Error from late notice of the State's elected offense should be analyzed for non-constitutional harm.

When the error boils down to the issue of notice, such as in this case, any delay in election should be analyzed under a non-constitutional harm standard. *See Owings*, 2017 WL 4973823 *9 (Yeary, J. concurring). This Court has found that the constitutional requirement that a defendant be given notice before trial of the "nature and cause" of the accusation against him with sufficient clarity and detail to enable the defendant to anticipate the State's evidence and prepare a proper defense is satisfied by the charging instrument. *Garcia v. State*, 981 S.W.2d 683, 685 (Tex. Crim. App. 1998); *see also Owings*, 2017 WL 4973823 *9 (Yeary, J. concurring) ("Notice is ordinarily a question of what a defendant knows his exposure will be

before trial commences, and in Texas it usually comes from the charging instrument…").

"Defendants are presumed to know that an indictment alleging they committed an offense 'on or about' a particular date will support a conviction for any commission of the alleged offense occurring anterior to the indictment and within the applicable period of limitations." *Owings*, 2017 WL 4973823 *9 (Yeary, J. concurring) (citing *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997)). An indictment need not specify the precise date when the charged offense occurred, and the "on or about" date included in the indictment does not cause a charging instrument to fail to meet the notice requirements of the Texas Constitution. *Garcia*, 981 S.W.2d at 686; *see also Owings*, 2017 WL 4973823 *9 (Yeary, J. concurring). Moreover, this Court has noted that the primary purpose of a date in the indictment is not to notify the accused of the date of the offense but rather to show that the prosecution is not barred by the statute of limitations. *See id.*

Where multiple instances of conduct may prove the charged offense, a defendant is given the opportunity to require the State to elect which offense it moves forward. *Id.* A defendant is aware prior to trial that he can choose to either force an election or attempt to defend against all allegations; the decision is one of strategy. *Id.* And this Court has held that in the unlikely event a defendant is surprised by the evidence, he should ask for a postponement. *Garcia*, 981 S.W.2d at

686 (finding defendant surprised by State's evidence in satisfaction of its "on or about" allegation should ask for a postponement, but the notice provision of Article I, § 10, is not implicated). Therefore, when notice is the only concern implicated from an election error, the harm is not of a constitutional level.[11]

Here, as previously stated, the appellant was aware of the allegations and extraneous offenses that the State intended to prove at trial (CR—14, 58-61, 88-90). Regardless if the appellant had been charged with the bedroom incident or the bathroom incident, the language included in the indictment would have been the same. Contrary to the Fourteenth Court of Appeals' analysis, the included "on or about date" does not refer to a specific offense; it included any commission of the alleged offense occurring anterior to the indictment and within the applicable period of limitations.[12] *See Garcia*, 981 S.W.2d at 686. If the appellant was surprised by the bathroom allegation, his remedy would have been to ask for a continuance, but he did not ask for a continuance and did not alert the court of any surprise from the allegations at any point during trial. *See id*.

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[11] Additionally, this case raises the question of whether election error should ever be analyzed for constitutional harm. As Judge Yeary discussed in his concurrence in *Owings*, "[w]hen the decision whether to force an election is so much a matter of trial strategy, and the right to a jury-unanimity instruction remains inviolate regardless of which course a defendant chooses, it is hard to credit *Phillips's* conclusion that election error itself is of constitutional dimension." *See Owings*, 2017 WL 4973823 at *9 (Yeary, J. concurring).

[12] *See infra*. The effect of the court of appeals' holding regarding the "on or about" date is discussed in the second issue on review.

Moreover, as previously stated, the trial court instructed the jury to convict only if they found that the appellant penetrated Jane's female sexual with his sexual organ in the *bathroom*, requiring the jury to agree to that particular incident (CR—113). It is these factual differences—the delayed election and specified offense in the jury charge—that differentiate this case from this Court's recent opinion in *Owings* and raise the concern of whether constitutional harm should apply under these circumstances. *Cf. Owings*, 2017 WL 4973823 at *8. Thus, this case presents this Court with the opportunity to review whether constitutional harm should apply to a delayed-election error or election error at all.

Regardless, the record reflects that under either harm standard, the appellant was not harmed by the delay in receiving the election. In addition to the reasons stated above, looking at the record as a whole, it can be determined beyond a reasonable doubt that the error did not contribute to the appellant's conviction. While there was evidence of possibly two acts of penetration, uncertainty surrounded whether any penetration occurred during the bedroom incident. Jane only testified that the penetration occurred in the bathroom and did not describe penetration in the bedroom (3 RR 126-28, 135-36). Landa, the only source of the evidence surrounding the bedroom incident, was unsure of the location of penetration, responding "I think so" to a direct question of whether Jane was penetrated in the bedroom (3 RR 99-103). And immediately thereafter,

the appellant showed Landa the medical records stating that there was no penetration (3 RR 99-100). See (St. Ex. #9). Thus, in light of the state of the evidence along with the instruction to convict only on the bathroom incident, it is unlikely that the jury reached a non-unanimous verdict or possibly added up incidents to reach a finding of guilt.

Finally, the parties' arguments did not exacerbate the error from the delay in election. *Cf. Garcia*, 2017 WL 6374691 at *8-9. Contrary to the court of appeals' analysis, the appellant's argument—the State "change[d] gears ... trying to say that there was something that happened in a bathroom in some part of some apartment" and questioned "where is the evidence here?"—did not conflate the incidents; rather, the appellant pointed out that the State was seeking a conviction on the bathroom incident and questioned what evidence was presented to support the bathroom allegation (5 RR 16). Additionally, the State's argument regarding the semen found pointed out evidence that corroborated Jane's testimony that she was sexually assaulted and rebutted the appellant's general denial (5 RR 23, 24-28). Furthermore, the State argued that it was not a "who-done-it" situation because no evidence of a separate sexual partner was presented (5 RR 25). Thus, nothing about the arguments informed jurors they could convict on *any* assault.

Accordingly, the election error should not have resulted in reversal when the testimony of multiple instances of abuse was admissible, the appellant's

defense was the same across the board, and the jury was specifically charged on the offense the complainant described.

SECOND GROUND FOR REVIEW

How specific must the factual rendition of a single incident in the jury charge be to serve the purposes the election requirement?

In finding harm, the Fourteenth Court of Appeals stated that the application paragraph in the jury charge referred to two incidents. *Garcia*, 2017 WL 6374691 at *7-9, 10. The court held that the election made was insufficient to properly elect between two offenses, finding that the inclusion of the charged "on or about" date and the specific location language in the application paragraph was a combination or conflation of incidents under the second prong of the *Dixon* harm analysis. *Id*. at *10.[13] But the court of appeals' harm analysis misunderstands the effect of the "on or about" date in the application paragraph and creates precedent

[13] Notably, the question of whether the language used sufficiently elected between offenses was not raised at trial or on appeal. *See* TEX. R. APP. P. 33.1. At trial appellant neither objected to the court's charge nor to the language used to make the election as insufficient (CR—113; 4 RR 111-13; 5 RR 7-10). On appeal, appellant only raised the error from the delay in timing of the election: the trial court's failure to require the State to elect at the close of its case in chief; jury charge error was not raised on appeal. *See* (App'nt Orig. Brf. 1-12); *Reza*, 339 S.W.3d at 713 (distinguishing charge error from the failure of the court to require an election). Rather, the Fourteenth Court of Appeals addressed the charge in its harm analysis and on its own found the language insufficient to elect an offense, creating an unworkable precedent for this state's jurisprudence. Because the lower courts' opinion decided an important question of state law that conflicts with this Court's precedent and should be decided by this Court, this Court's guidance is needed. *See* TEX. R. APP. P. 66.3(b), (c).

that the "on or about" date in the application paragraph undermines other specific election language describing an incident.

Contrary to the court of appeals harm analysis, the application paragraph did not ambiguously submit two possible offenses—it submitted one. The court of appeals found that the inclusion of the "on or about" date in the application paragraph conflated the two assaults. *See Garcia*, 2017 WL 6374691 at *7-9. But the record shows the application paragraph tracked the language of the indictment and specifically instructed the jury that it could only convict based on the assault in the *bathroom*. *See* (CR—113).

The court of appeals points to the "on or about" date and finds that it is descriptive of the second incident in the bedroom. *See Garcia*, 2017 WL 6374691 at 7-9. Thus, for the first time a court found that the inclusion of the charged "on or about" date, which by its very nature does not specify a date certain, instructed the jury to convict only on an offense that occurred on that date, providing for a non-unanimous verdict. But that stands contrary to this Court's precedent. *See Garcia*, 981 S.W.2d at 686-87 ("Our jurisprudence has never required the State to prove a specific date even where a specific date has been pled in the indictment."); *Bonilla v. State*, 452 S.W.3d 811, 831 (Tex. Crim. App. 2014) ("It is well settled that the 'on or about' language of an indictment allows the State to prove a date other than the

one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period.").

While the "on or about" date closely correlated with the extraneous bedroom offense, it also correlated with the bathroom incident. Jane's testimony was unclear when exactly the bathroom incident occurred, hence the purpose behind an "on or about" date (3 RR 122-29). Thus, the two references the court of appeals points to are not of equal value.

There was not a danger that some jurors convicted the appellant of the August 16 bedroom incident because the paragraph that authorized a conviction required jurors to find that it happened in the *bathroom*. The application paragraph specifically instructed the jury that to find the appellant guilty they must "unanimously" find that Jane was sexually assaulted "inside a *bathroom* inside an apartment [Jane] shared with her mother, brothers, and the defendant" (CR—113) (emphasis added). The word *bedroom* did not appear anywhere in the application paragraph.

Moreover, the jury received an instruction regarding the "on or about" language, explaining they were not bound by any specific date as long as it found the offense occurred within the statute of limitations (CR—115). The jury is presumed to have followed the trial court's instructions and the record contains nothing that rebuts this presumption. *Thrift*, 176 S.W.3d at 224. Thus, the verdict

was still unanimous about the location even if the jurors believed that Jane was mistaken about the date of the offense.

Furthermore, the "on or about" date in the application paragraph was not some random date that the State chose, but was the offense date charged in the indictment, which could not be amended mid-trial. *See* TEX. CRIM. PROC. CODE ANN. art. 28.10 (West) (an amendment can only be made *before* the date the trial on the merits commences). Nor was it necessary to amend based on the "on or about" language. *See Garcia*, 981 S.W.2d at 686-87 (finding no error, constitutional or otherwise, for an indictment to allege an "on or about" date for the charged offense rather than specifying the precise date). Thus, contrary to the court of appeals' analysis, there is nothing in the application paragraph that indicated the jury could convict on both the "bathroom incident" and the "bedroom incident."

Accordingly, there is no concern under the second prong of *Dixon* that the jury might have added up two not-quite-proven offenses to get the State across the finish line. Nor was there a concern under the third prong that the jury was not unanimous about the offense occurring in the bathroom. And there was nothing about the inclusion of the "on or about" date or the failure to provide a different date that deprived the appellant of adequate notice and opportunity to defend. The court of appeals erred in finding otherwise. Accordingly, as previously stated, the appellant was not harmed by the election error.

It is unclear what more specificity the State needed to employ to charge the jury on the election made. The distinguishing fact between the two incidents as recognized by the court of appeals was the location—bathroom versus bedroom, which was the language used to instruct the jury. It begs the question that if reversed, how would the language in the court's charge change? To the extent that the lower court finds that the language used to instruct jurors was insufficient—something not raised at the trial court or on appeal—this Court's guidance is needed to inform lower courts what amount of specificity is required to satisfy the election requirement.

This case creates precedent that using the charged "on or about" date in the application paragraph undermines other specific election language describing an incident. But, as previously stated, that is contrary to this Court's precedent. This Court has held that the primary purpose of the "on or about" date is not for notice; rather, it is to show that the prosecution is not barred by the statute of limitations. *Garcia*, 981 S.W.2d at 686. Additionally, as with most child abuse cases, it may be impossible to know precisely when the charged offense occurred. *Id.*; *see also Dixon*, 201 S.W.3d at 736 ("[I]t is not often that a child knows, even within a few days, the date that she was sexually assaulted. And, the younger the child, the greater the possibility" that she will be uncertain about the timing of the offense."). While it may be possible that the "on or about" date comports with the specified offense,

it is not so material that it can undermine other language used to specify the elected offense. *See id*.

The language used to instruct the jury on the elected offense should be the lowest amount of data points established by the evidence that set the elected offense apart from the other offenses described by the evidence; for instance, the surrounding details to the offense or, as in this case, the location of the offense. *See, e.g.*, *Reza*, 339 S.W.3d at 712 (finding language "first time Reza put cream on his finger, put his finger down [complainant's] pants, and penetrated her sexual organ" sufficient for an election). Additional unnecessary data points should not result in reversible error, but the best practices should be to limit the number of additional evidentiary elements that are not included in the charging instrument.

Because the application paragraph limited the jury's consideration to a single location where *one* act that met the elements of the indictment occurred on *one* occasion, the verdict was still unanimous. The court of appeals erred in finding the election insufficient to overcome a unanimity concern in its harm analysis. Accordingly, the appellant was not harmed by the election error.

CONCLUSION

It is respectfully requested that the Court of Appeals' judgment on this issue be reversed, and that the appellant's conviction be affirmed.

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Date: 4/30/2018

APPENDIX A

Garcia v. State,
14-16-00242-CR, 2017 WL 6374691
(Tex. App.—Houston [14th Dist.] Dec. 14, 2017, pet. filed).

2017 WL 6374691
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.
Court of Appeals of Texas,
Houston (14th Dist.).

Freddy GARCIA, Appellant
v.
The STATE of Texas, Appellee
NO. 14-16-00242-CR
|
Opinion of July 20, 2017
|
Opinion Filed December 14, 2017

On Appeal from the 174th District Court, Harris County, Texas, Trial Court Cause No. 0482220

Attorneys and Law Firms
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Eric Kugler, Kathryn Davis, Kim K. Ogg, Houston, for Appellee.

Panel consists of Justices Boyce, Jamison, and Brown.

SUBSTITUTE OPINION

William J. Boyce, Justice
***1** We overrule the State's motion for rehearing, withdraw our opinion dated July 20, 2017, and issue the following substitute opinion. The disposition remains the same.

A jury convicted appellant Freddy Garcia of aggravated sexual assault of a child, and the trial court sentenced him to 45 years' confinement and a $10,000 fine. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (a)(2)(B) (Vernon Supp. 2016). In two issues, appellant contends that: (1) he was denied his right to a speedy trial; and (2) the trial court erred by failing to require the State to elect at the close of its case-in-chief which alleged incident of sexual assault it sought to submit to the jury. We conclude appellant's right to a speedy trial was not violated, largely because he acquiesced to the delay when he became a fugitive. However, we are not convinced beyond a reasonable doubt that the State's failure to elect which act it relied upon to pursue a conviction had no or but slight effect on the jury's verdict. Accordingly, we reverse the trial court's judgment and remand for a new trial.

BACKGROUND

In 1986, complainant was 11 years old when she moved from Mexico to Houston to live with her mother, two half-brothers, and appellant, her step-father. Complainant often would be left alone with appellant in the evenings while her mother went to work. Over the course of the next year, appellant allegedly sexually assaulted complainant in a series of escalating incidents. Complainant testified at trial that on one occasion during that time period appellant forced complainant into their apartment bathroom and penetrated her vagina with his penis.

On August 16, 1987, complainant's mother left complainant with appellant while she went to run an errand. Complainant's mother returned home early and found appellant in complainant's bedroom with his pants down. Complainant's mother and appellant argued, and appellant left the apartment and did not return.

Appellant was arrested the next day and was indicted on August 28, 1987. The indictment alleged a single count of sexual assault—specifically, that appellant penetrated complainant's sexual organ with his own sexual organ on or about August 16, 1987.

Appellant was released on bond, but an arrest warrant was issued when he subsequently failed to appear in court. Appellant eluded authorities for 27 years until he was located in North Carolina and arrested on November 18, 2014. Appellant was extradited to Texas on January 19, 2015.

The case went to trial on February 5, 2016. A jury found appellant guilty of aggravated sexual assault of a child and the trial court sentenced him to 45 years' imprisonment and assessed a $10,000 fine. Appellant timely appealed.

ANALYSIS

I. Speedy Trial

In his second issue, appellant contends that his right to a speedy trial was violated because he was not brought to trial until more than 28 years after he was indicted. Because this is a threshold issue that would serve as an absolute bar to prosecution, we address it first. *See* *Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (proper remedy for speedy trial violation is dismissal of indictment); *Shaw v. State*, 117 S.W.3d 883,

888 (Tex. Crim. App. 2003) (speedy trial violation results in dismissal of the prosecution with prejudice).

***2** The Sixth Amendment to the United States Constitution guarantees the right of an accused to a speedy trial. U.S. CONST. amend. VI. In conducting a speedy trial analysis, a reviewing court looks to the four factors set out in *Barker*. The *Barker* test balances: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; and (4) prejudice to the defendant. *Id.* In conducting a speedy trial analysis, we review legal issues *de novo* and review the trial court's resolution of factual issues for an abuse of discretion. *See Kelly v. State*, 163 S.W.3d 722, 726 (Tex. Crim. App. 2005).

A. The Length of the Delay

This first factor is a double inquiry. *See Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). A court first "must consider whether the delay is sufficiently long to even trigger a further analysis under the *Barker* factors, and if it is, then the court must consider to what extent it stretches beyond this triggering length." *Hopper v. State*, 520 S.W.3d 915, 924 (Tex. Crim. App. 2017).

To initially trigger a speedy trial analysis, the defendant must show that the interval between accusation and trial crosses the threshold dividing ordinary delay from "presumptively prejudicial" delay. *Doggett*, 505 U.S. at 651-52, 112 S.Ct. 2686. Presumptive prejudice in this context simply means that a delay is facially unreasonable enough to conduct a full inquiry into the remaining *Barker* factors. *Id.* at 652, 112 S.Ct. 2686 n.1. There is no bright-line rule for determining when a delay violates the right to a speedy trial. *Hull v. State*, 699 S.W.2d 220, 221 (Tex. Crim. App. 1985) (en banc). Generally, courts find a delay approaching one year sufficient to trigger a full inquiry. *Doggett*, 505 U.S. at 652 n.1, 112 S.Ct. 2686; *Dragoo v. State*, 96 S.W.3d 308, 314 (Tex. Crim. App. 2003).

Once the defendant establishes a presumptively prejudicial delay, the reviewing court must then consider the extent to which the delay has stretched beyond the threshold. *See Doggett*, 505 U.S. at 652, 112 S.Ct. 2686. This second inquiry is significant to the speedy trial analysis because the presumption that pretrial delay has prejudiced the defendant intensifies over time. *Id.*

In this case, more than 28 years elapsed between the time of appellant's indictment and trial. A delay of 28 years is sufficient to trigger a full *Barker* analysis. *See Dragoo*, 96 S.W.3d at 314. Given the length beyond the threshold, we conclude that this factor weighs against the State. *See Gonzales v. State*, 435 S.W.3d 801, 809 (Tex. Crim. App. 2014) (six-year delay weighed heavily against the State).

B. Reason for Delay

The State carries the burden of justifying its delay. *Cantu v. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008). Valid reasons for delay do not weigh against the State, whereas bad-faith delays weigh heavily against the State. *See Hopper v. State*, 495 S.W.3d 468, 474 (Tex. App.—Houston [14th Dist.] 2016), *aff'd*, 520 S.W.3d 915 (Tex. Crim. App. 2017).

The delay here covers two distinct periods. The first period runs from the time of appellant's indictment until the appellant's re-arrest and extradition to Texas—a span of roughly 27 years. The second period runs from the time appellant came into the State's custody on January 19, 2015, until appellant's trial on February 5, 2016—a span of approximately 13 months.

The State has valid reason for the first portion of the delay; appellant was a fugitive for nearly this entire period. *See id.* at 475 (first period of delay, where "appellant was either on the run or facing trial in Nebraska," did not weigh against State); *Lott v. State*, 951 S.W.2d 489, 494 (Tex. App.—El Paso 1997, pet. ref'd) (a fugitive "undoubtedly bears at least some fault for the length of the delay").

***3** Appellant nevertheless contends that this period of the delay should weigh against the State because the State was negligent in its attempts to locate appellant. The evidence demonstrates otherwise. Appellant used a different name and social security number on at least one occasion when he applied for a driver's license in Florida. Investigators periodically searched for appellant, including checking his last known address on several occasions, searching national databases, placing wanted ads in newspapers, and featuring appellant on the Crime Stoppers website. These efforts began in 1987 and continued until 2014 when an investigator with the Harris County District Attorney's Office located appellant living in North Carolina. We conclude the State was diligent in attempting to locate appellant. *See Lott*, 951 S.W.2d at 495 (State was diligent in attempting to locate appellant where search covered "many search avenues ... over the course of thirty years and four investigations," despite lengthy gaps between search efforts). Consequently, the reason for this part of the overall delay does not weigh against the State. *See id.* (where appellant contended that State should have located him when he received services at a veterans' hospital, court concluded that "the State's failure to continue with an active investigation which might have detected that Lott had 'surfaced' under his own name in order to receive veterans' benefits in 1986 stemmed not from a lack of diligence, but from Lott's own crafty, and successful, twenty-year-old disappearing act").

Regarding the second part of the delay, spanning the period after his re-arrest but before trial, the record shows that appellant agreed to six trial resets and at one point requested a trial continuance, which was granted. Appellant therefore is partially responsible for the second period of delay between his re-arrest and trial, and this factor weighs neither for nor against the State.

C. Assertion of Right to Speedy Trial

The right to a speedy trial is unlike other rights enshrined in the Constitution because the deprivation of the right, in some instances, may actually work to the defendant's advantage. *See* *Barker*, 407 U.S. at 521, 92 S.Ct. 2182. As the pretrial delay increases, witnesses can die, their memories can fade, or they can become unavailable for any number of other reasons. *See* *Hopper*, 495 S.W.3d at 476. If these witnesses supported the State's theory of the case, then the prosecution will be impaired, and that impairment will work to the benefit of the defendant because the State carries the burden of proof. *Id.* For that reason, the Supreme Court has recognized that "[d]elay is not an uncommon defense tactic." *Barker*, 407 U.S. at 521, 92 S.Ct. 2182.

Of course, delay also can prejudice the defendant, because with the passage of time grows the possibility that the defense may lose an alibi witness or access to other evidence with exculpatory value. *Id.* at 532, 92 S.Ct. 2182. The more seriously that a defendant perceives a loss of this sort, the more likely he is to complain; accordingly, the defendant bears "some responsibility to assert a speedy trial claim." *Id.* at 529, 92 S.Ct. 2182.

The record shows that appellant sat on his rights for more than 27 years before asserting his right to a speedy trial. The record also shows that for most of that time appellant was a fugitive. Appellant fled after being released on bond, indicating that he was on notice as to the charge against him. His flight evidences a lack of desire for any trial, much less a speedy one. *See* *Hopper*, 520 S.W.3d at 928 ("Because we have determined that the record supports a conclusion that appellant knew about his Texas charge, his complete failure to assert his right to a speedy trial for more than eighteen years suggests that he did not really want a speedy trial."); *Lott*, 951 S.W.2d at 495 (factor weighed against appellant when the evidence "support[ed] a finding that Lott, knowing of the charges, chose to remain at large for more than thirty years without ever demanding a trial.").

Further, appellant did not adequately assert his rights following his ultimate re-arrest. Appellant agreed to three resets between January 19 and August 31, 2015, at which time he filed a motion to dismiss for a speedy trial violation. Following this objection (to which it does not appear appellant secured a ruling), appellant agreed to three more resets and on one occasion requested a continuance. This court previously has held that "[w]e exclude the time covered by agreed resets from the speedy trial calculation because agreed resets are 'inconsistent with [the] assertion of a speedy trial right.' " *Smith v. State*, 436 S.W.3d 353, 365 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (quoting *Celestine v. State*, 356 S.W.3d 502, 507 (Tex. App.—Houston [14th Dist.] 2009, no pet.)).

***4** Consequently, this factor weighs heavily against appellant.

D. Prejudice to Appellant

We review this final factor in light of the interests that the right to a speedy trial was designed to protect. *See* *Barker*, 407 U.S. at 532, 92 S.Ct. 2182. The Supreme Court has identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize the defendant's anxiety and concern; and (3) to limit the possibility that the defense will be impaired. *Id.* Of these, the last is the most serious because the inability of a defendant to adequately prepare his case skews the fairness of the entire justice system. *Id.*

Appellant was not imprisoned during the 27 years he was a fugitive, and was tried within six months of requesting a speedy trial. Therefore, there was no risk of oppressive pretrial incarceration. *See* *Lott*, 951 S.W.2d at 496 ("Finally, Lott was not incarcerated for the thirty-year period between the original indictment and the final resolution of this case. Lott's case was finally disposed of within eight months after his first, and only, demand for a speedy trial.").

Appellant makes no claim of suffering any anxiety or concern. Regardless, any anxiety or concern suffered during his flight from justice was self-imposed. Accordingly, the second interest is not relevant here.

Appellant largely focuses on the third interest. Appellant first contends that we should presume prejudice resulted from the "excessive delay." *See* *Doggett*, 505 U.S. at 655, 112 S.Ct. 2686. Such a presumption may be tempered, however, by extenuating circumstances, including a defendant's acquiescence in the delay. *See, e.g.*, *Hopper*, 520 S.W.3d at 928; *Dragoo*, 96 S.W.3d at 315.

As we explained above, the third factor does not favor appellant and supports a finding that appellant acquiesced in the delay. Appellant was aware that a charge was pending against him and yet sat on his rights for more than 27 years despite having the opportunity to resolve that charge by returning to Texas and demanding a trial. We conclude that, even if we applied a presumption of prejudice in this case, the presumption is rebutted because appellant acquiesced in the delay. *See* *Hopper*, 520 S.W.3d at 929 ("Any presumptive prejudice due to the

passage of time was extenuated by appellant's acquiescence in the delay and even further extenuated by appellant's failure to employ a remedy that would have guaranteed him a speedy trial.").

Appellant further contends he was actually prejudiced. Appellant relies primarily on the State's destruction of physical evidence in 1998—specifically, the destruction of physical evidence that reflected the presence of semen on a vaginal smear collected from complainant. Appellant argues this destruction prejudiced his defense because DNA testing of the evidence may have exonerated him.

Appellant's argument is speculative. The destroyed evidence could have been either incriminating or exculpatory and, "[w]ithout knowing the quality of evidence, appellant can only speculate that the loss has impaired his defense." *See* *Hopper*, 495 S.W.3d at 479. Moreover, appellant used the lack of DNA evidence to cast doubt on the State's case. Appellant further argued that the State acted in bad faith when it destroyed the evidence and a spoliation instruction was included in the jury charge that permitted the jury to infer that the destroyed evidence was beneficial to appellant.

***5** The delay also may have worked in appellant's favor. Complainant's mother died in the interim between appellant's indictment and trial. The testimony of complainant's mother—who walked in on appellant and complainant on August 16, 1987, and thereafter called the police on appellant—may have been more damaging to the defense than the testimony of complainant, who was 12 at the time of the incident.

We conclude that this final factor does not weigh in appellant's favor. It is unclear whether appellant suffered actual prejudice, and it appears appellant received some benefit from the delay.

E. The Balancing Test

Having addressed the four *Barker* factors, we must now balance them. *See* *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. "[C]ourts must apply the *Barker* balancing test with common sense and sensitivity to ensure that charges are dismissed only when the evidence shows that a defendant's actual and asserted interest in a speedy trial has been infringed." *Cantu*, 253 S.W.3d at 281. No single factor is either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

The only factor weighing in favor of a violation of appellant's speedy trial right is the first factor: that the delay was excessive. Weighing against a violation are the second and third factors: that appellant was primarily responsible for the delay, and that appellant did not assert his right to a speedy trial for more than 27 years while avoiding arrest, and then for seven months after his arrest. The fourth factor—prejudice resulting from the delay—weighs neither for nor against appellant.

Any prejudice appellant suffered as a result of the delay is attenuated by his acquiescence to the delay. Appellant knew that he was indicted and took special precautions not to be found by law enforcement, including changing his name and social security number. Appellant is responsible for more than 27 years of the approximately 28-year-delay, and appellant agreed to trial continuances covering the majority of the remainder. Accordingly, it does not appear that appellant truly desired a speedy trial. *See* *Hopper*, 495 S.W.3d at 481. Consequently, after balancing the four factors, we find no violation of appellant's right to a speedy trial. We overrule appellant's speedy trial issue.

II. State's Election

In his other issue, appellant contends that the trial court erred by failing to require the State to elect at the close of its case-in-chief under which incident it sought to convict.

A. When an Election is Required

The long-standing general rule is that the State must elect the act that it will rely upon for conviction when an indictment alleges one sexual assault but more than one sexual assault is shown by the evidence at trial. *See* *O'Neal v. State*, 746 S.W.2d 769, 771 (Tex. Crim. App. 1988) (en banc). If a defendant timely requests an election under such circumstances, the trial court must order the State to make its election at the close of the State's case-in-chief. *Id.* at 772. The trial court's failure to do so is constitutional error, and we must reverse unless we determine that the error was harmless beyond a reasonable doubt. *Phillips v. State*, 193 S.W.3d 904, 913-14 (Tex. Crim. App. 2006).

Requiring the election forces the State to formally differentiate the specific evidence upon which it relies as proof of the charged offense from evidence of other offenses or misconduct it offers only in another evidentiary capacity. *Id.* at 910. This allows the trial court to give clearer instruction to the jury on the proper use and weight to accord each type of evidence. *See* *id.* Further, the lack of such an election implicates fundamental constitutional principles, *viz*: due process and due course of law. *Id.* at 913.

B. Was an Election Required Here?

***6** The State argues that no election was required because

only one act of the kind alleged in the indictment was shown by the evidence. The indictment alleged a single instance of sexual assault involving penetration of complainant's vagina by appellant's penis.

Complainant testified regarding an incident that occurred in the bathroom at the second of three apartments in which she lived with her mother and appellant. Complainant testified that appellant called her into the bathroom, made her take off her clothes, put his penis in her vagina, and raped her. Complainant did not specify a date for this incident, but believed she was 11 at the time.[1]

The State does not dispute that this constitutes evidence of a penetration as alleged in the indictment. The State does dispute that any evidence was presented of a second penetrative assault like that alleged in the indictment. Appellant contends that at least some evidence was presented from which the jury could have determined that a second penetrative assault occurred on August 16, 1987, in complainant's bedroom.

Regarding the August 16 incident, complainant testified that her mother left to run an errand and that appellant followed complainant into her bedroom and pulled his pants down. Complainant provided conflicting testimony regarding whether appellant was able to remove her clothes before her mother returned. She first testified that appellant did take her clothes off, but later could not remember whether appellant was able to take off her pants and underwear. The following exchange took place regarding whether penetration occurred on August 16:

> [STATE:] Where was [appellant's penis]—where was it in relation to you?
>
> [COMPLAINANT:] What do you mean?
>
> [STATE:] I'm not asking that good. Was he touching you with his penis at the time?
>
> [COMPLAINANT:] I mean, he was forcing me in that moment to try to take off my clothes.
>
> [STATE:] Okay. Was his—
>
> [COMPLAINANT:] Because I was refusing not to do what he wanted me to do. He's like no, forcing me on top of me and try to take off my pants and my underwear.

The State did not follow up and clarify regarding whether penetration occurred.

Other evidence suggested that penetration did occur during the August 16, 1987 bedroom incident. At trial, the police officer with the juvenile crimes division who interviewed complainant in 1987 testified that complainant told her that complainant was penetrated on August 16. The officer first testified that she remembered complainant telling her that appellant "got on top of [complainant]" and "put his penis in her vagina" on August 16. She later testified that, "[o]n the 16th, I don't know if she was penetrated, but other days she said she was." Finally, she testified on redirect (after reviewing her offense report) that, on the day complainant's mother caught appellant, complainant "said that [appellant] put his penis in her vagina a little because her mother got there."

***7** Likewise, a report prepared by the Houston Police Department's Crime Laboratory indicated that there was semen present in a vaginal smear taken from complainant during a sexual assault exam performed on August 17, 1987. As discussed previously, the semen was never DNA tested and the evidence was subsequently destroyed, but the jury could have believed this to be some evidence that a penetration occurred during the August 16, 1987 bedroom incident. No evidence was presented that complainant—who was 12 years old at the time—was sexually active with any other individual; the jury therefore may have believed that the semen was appellant's.

Several times during witness testimony and again at the close of the State's case-in-chief, defense counsel objected and requested that the State elect on which act it would proceed for conviction. The trial court denied the request, incorrectly concluding that the State was not required to elect until the close of all evidence. We conclude that at least some evidence was presented of a second assault conforming with the indicted offense. Accordingly, the State was required to elect upon appellant's timely request. The trial court's failure to require the State to elect at the close of its case-in-chief was error.

We determine next whether the failure to require a timely election was harmful.

C. Harm Analysis

Having concluded that the failure to require an election at the close of the State's case-in-chief constituted error, we must reverse the conviction unless we find beyond a reasonable doubt that the error did not contribute to the conviction or had but slight effect. *See* *Phillips*, 193 S.W.3d at 912-14 (citing Tex. R. App. P. 44.2(a)).

In determining whether the failure to require a timely election was harmful, we consider the four purposes behind the election rule:

> (1) to protect the accused from the introduction of extraneous offenses;
>
> (2) to minimize the risk that the jury might choose to convict not because one or more crimes were proved

beyond a reasonable doubt, but because all of them together convinced the jury the defendant was guilty;

(3) to ensure a unanimous verdict as to one specific incident which constituted the offense charged in the indictment; and

(4) to give the defendant notice of the particular offense the State intends to rely upon for prosecution and afford the defendant an opportunity to defend.

Dixon v. State, 201 S.W.3d 731, 733 (Tex. Crim. App. 2006).

1. Extraneous offenses

With regard to the first *Dixon* factor—protecting the accused from the introduction of extraneous offenses—Article 38.37 of the Texas Code of Criminal Procedure permits the admission of evidence of relevant extraneous offenses committed by a defendant against a child victim. *See* Tex. Code Crim. Proc. Ann. art. 38.37 (Vernon Supp. 2016); *Dixon*, 201 S.W.3d at 734; *Phillips*, 193 S.W.3d at 911. Accordingly, the first purpose does not weigh in favor of reversal.

Although evidence of extraneous offenses may be admissible, their admissibility "does not restrict a defendant's right to have the State elect the incident for which it will seek a conviction...." *See Phillips*, 193 S.W.3d at 911. Here, appellant objected to the State's presentation of evidence concerning extraneous sexual offenses and requested that the State be required to elect whether it sought to convict as to each of those offenses. The trial court did not require an election on any of the other non-penetrative offenses.

2. Combination of incidents and unanimity

We conclude that the second and third *Dixon* factors weigh in favor of reversal.

There was at least some evidence of two separate penetrative sexual assaults: (1) the bathroom incident; and (2) the August 16, 1987 bedroom incident. That evidence was presented from different sources, increasing the likelihood that the jury added up different events and testimony from different witnesses in rendering its verdict.

***8** Additional circumstances in this case further increase the likelihood that the failure to require an election at the close of the State's case-in-chief thwarted the purposes underlying the second and third *Dixon* factors.

The jury charge in this case appeared to present only one incident as a basis for conviction, but the charge referenced a single penetrative assault that occurred (1) in a bathroom; ***and*** (2) on or about August 16, 1987. This record demonstrates that the earlier penetrative assault in the bathroom of the family's apartment when the complainant was 11 is a separate incident distinct from the later penetrative assault in the bedroom of a different apartment on August 16, 1987, when the complainant was 12.

The trial court charged the jury with an instruction that conflated the earlier bathroom incident and the separate August 16, 1987 bedroom incident:

> Now, if you unanimously find from the evidence beyond a reasonable doubt that on or about the 16th day of August, 1987, in Harris County, Texas, the defendant, Freddy Garcia, did then and there intentionally or knowingly cause the penetration of the female sexual organ of [complainant], a person younger than fourteen years of age and not his spouse, by placing his sexual organ in the female sexual organ of [complainant], while inside a bathroom inside an apartment [complainant] shared with her mother, brothers, and the defendant, then you will find the defendant guilty of aggravated sexual assault of a child, as charged in the indictment.

The charge also instructed the jury that the State is not bound by the specific date on which the offense is alleged in the indictment to have been committed.

The State argued in closing that appellant "took [complainant's] virginity away in a bathroom while her mom was at work," but also argued that the semen collected from the August 16, 1987 bedroom incident was helpful to the State because there was "no other evidence of anyone [else] in that girl's life," suggesting that the semen was appellant's. The defense highlighted the ambiguity of the charge in closing:

> So, now you're given a jury instruction talking about what they have to prove to you. So, all of the evidence that was presented to you had to do with events that happened on August 16th of 1987. But then they change gears and now they're trying to say that there was something that happened in a bathroom in some part some apartment [sic]—and this is

> language that you're going to read—some bathroom, some apartment. How in a small apartment with two bedrooms that—I mean, where is the evidence here? How do we even know what apartment complex, what date it happened on?

Here, the jury charge and closing arguments conflated two incidents; but even if the jury charge had unambiguously presented only one incident for the jury's consideration, a proper jury charge cannot take the place of a timely election. *See* *Phillips*, 193 S.W.3d at 912.

Because some evidence was presented that penetration may have occurred both in a bathroom and separately on August 16, 1987, in complainant's bedroom, there is a significantly increased possibility that (1) the jury convicted based on a combination of the offenses without believing that the State proved one of those offenses beyond a reasonable doubt; or (2) some members of the jury convicted based on the bathroom incident and others based on the August 16, 1987 bedroom incident. *See* *Phillips v. State*, 130 S.W.3d 343, 353 (Tex. App.—Houston [14th Dist.] 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006) (finding constitutional error where "both offenses were described in detail more than once ... yet, it was completely unclear to the jury which act the State would rely upon for conviction"). This significant possibility is made more likely because the jury charge—and the parties' closing arguments based on that charge—conflated these two separate incidents of penetrative assault.

3. Notice

***9** We conclude that the fourth *Dixon* factor—providing notice to the defense of the particular offense the State intends to rely upon to convict and to afford the defendant an opportunity to defend—also weighs in favor of reversal. Because evidence of two assaults was presented, appellant had to defend against both assaults. The evidence presented concerned two discrete instances of penetration, and it was unclear in the absence of an election at the close of the State's case which incident the State would rely upon for a conviction, especially in light of the ambiguous jury charge and closing arguments.

We note that this fourth factor does not weigh heavily in favor of reversal because no evidence was presented at trial that appellant had a different defense to the separate alleged offenses. Appellant's defense across the board was that no sexual assaults ever occurred and that complainant fabricated the offense to get him out of her home because he was strict with her. His defense throughout trial also emphasized the lack of scientific evidence, missing evidence, and poor police investigation. It is unlikely that the jury's belief of appellant's defense that no sexual assault occurred at any time hinged on whether the State elected to designate one instance of sexual assault for its case-in-chief or another. *Cf.* *Taylor v. State*, 332 S.W.3d 483, 493 (Tex. Crim. App. 2011) (where the defensive theory was that no sexual abuse occurred at any time, egregious harm did not result from jury charge error because the jury either believed the appellant or the victim).

Because of the State's failure to elect which act it was relying upon for a conviction, it is possible that the jury convicted appellant by combining the bathroom incident and the August 16, 1987 bedroom incident to overcome reasonable doubt. Likewise, it is possible that some members of the jury convicted based on the bathroom incident, and others convicted based on the August 16, 1987 bedroom incident. Further, as a result of the State's failure to make an election appellant did not have adequate notice of which act the State would rely upon in time to present his defense, and was therefore required to defend against both potential offenses. This last violation is somewhat moderated by appellant's outright denial of any wrongdoing, but that does not excuse the State's failure to elect.

Based on the foregoing, we cannot say beyond a reasonable doubt that the trial court's error in failing to require the State to elect did not contribute to appellant's conviction. *See* *Phillips*, 130 S.W.3d at 353-54. We sustain appellant's first issue.

D. The State's Contentions on Rehearing

On original submission, the State's brief focused initially on its contention that "[t]he State presented evidence that appellant sexually assaulted [the complainant] ... in multiple ways, but only presented evidence of one act of penetration." According to the State's brief, "Because evidence of multiple acts of the sexual assault alleged in the indictment were not presented, an election was not required."

The State abandons its "one act of penetration" argument on rehearing and focuses instead on contentions that (1) the error at issue is a "delay in providing the election" or a "late election at the close of all evidence" rather than a failure to elect; and (2) any error with respect to election is harmless. We address these contentions in turn.

1. "Delay in providing the election"

According to the motion for rehearing, this court's opinion "incorrectly decide[d] harm as if no election was made, rather than based on the error presented: a delay in

providing the election." The State contends that it "elected a specific offense at the end of all evidence."

***10** The State's motion for rehearing cites to the jury charge in support of its contention that it "elected a specific offense at the end of all evidence." The State also cites portions of the reporter's record containing on-the-record colloquies among the trial court and counsel that occurred (1) after the State presented its case-in-chief and rested; and (2) after the defense presented evidence and both sides then rested at the close of evidence.

The cited portion of the jury charge is the same one quoted earlier, which appears to identify only one penetrative assault occurring on or about August 16, 1987—but simultaneously references an earlier penetration incident occurring in a bathroom. This portion of the jury charge conflates the earlier bathroom incident and the separate August 16, 1987 bedroom incident.

A review of the first cited colloquy confirms that the State made no election after presenting its case-in-chief and resting. Instead, counsel for the State and the defense discussed only ***timing*** of the election and debated whether the State was required to elect at the close of its case-in-chief (as the defense advocated) or at the close of all the evidence (as the State advocated). The trial court erroneously concluded at the end of the first colloquy that the election had to occur at the "[c]lose of all the evidence, including the State's case."

A review of the second cited colloquy confirms that the State made no election at the close of all the evidence when both sides rested. Instead, the State indicated it would make an election in the jury charge and stated: "It's just going to be a matter of us figuring out how to word the description of the specific incident we are electing to go forward on. So, if we could be allowed some time to do that."

There is no meaningful distinction to be drawn on this record between a failure to elect versus a late election. The State posits a "late election" that occurred in the jury charge. But "the jury charge does not serve 'as a *de facto* election' because it is given too late in the trial to afford a defendant the requisite notice to defend." *Owings v. State*, No. PD-1184-16, ––S.W.3d ––––, –––– n.8, 2017 WL 4973823, at *5 n.8 (Tex. Crim. App. Nov. 1, 2017) (citation omitted); *see also Phillips*, 193 S.W.3d at 912 ("A jury charge and an election are not interchangeable in this context. The State is required to elect at the close of its evidence when properly requested.").

In any event, the jury charge did not specify a single incident because it conflated the earlier bathroom penetrative assault and the later penetrative assault in the bedroom on August 16, 1987. On rehearing, the State no longer disputes that the earlier bathroom penetrative assault and the later August 16, 1987 penetrative assault in the bedroom of a different apartment are two separate incidents.

2. Harm

The State argues on rehearing that the second and third *Dixon* factors undergirding the election requirement "were not at issue and do not weigh in favor of harm" because "an election was ultimately made at the close of evidence and provided in the court's charge...." As discussed above, the record confirms that no purported election occurred at the close of evidence and the charge itself conflates two separate incidents involving penetrative assault. With respect to the fourth *Dixon* factor, the State argues on rehearing that it does not weigh in favor of reversal because "appellant did not distinguish between the offenses, have an alibi to one offense, or argue that one offense was impossible. Instead, his defense was the same across the board that no sexual assaults ever occurred...."

***11** In analyzing these contentions we draw guidance from the harm analysis in *Owings*, –– S.W.3d –––– – ––, 2017 WL 4973823, at *6-8, which was decided after the panel issued its original opinion in this case. The Court of Criminal Appeals concluded in *Owings* that the second, third, and fourth *Dixon* factors did not point in favor of harmful error arising from the trial court's erroneous failure in that case to require the State make an election at the close of its evidence.

The indictment in *Owings* "alleged one offense describing one act of genital-to-genital contact." *Id.* at ––––, 2017 WL 4973823, at *5. But the complainant "testified that Appellant put his penis in her vagina on numerous occasions." *Id.* "Hence, she testified to more than one act of genital-to-genital contact." *Id.* "Therefore, because the defense made a timely request, we agree with the court of appeals that the trial court erred by not requiring the State to elect the act of genital-to-genital contact upon which it would rely for a conviction." *Id.*

In assessing harm under the second *Dixon* factor, the court in *Owings* stated: "All of the incidents of sexual abuse in this case were recounted by the same source...." *Id.* at ––––, 2017 WL 4973823, at *6. That source was the complainant. *Id.* "This case did not involve the presentation of evidence of different activities from different sources that a jury might perceive to 'add up' to the defendant being guilty even though no individual offense was proven beyond a reasonable doubt." *Id.*

Owings also noted that "[t]here was very little variance in how [the complainant] ... described the genital-to-genital contact." *Id.* "And, but for the times when [the complainant] ... said Appellant put his penis in her vagina *and* she was also forced to perform oral sex, she described

a sequence of events that happened repeatedly in the same way and under the same circumstances in the same place." *Id.* (emphasis in original). The complainant "described repeated genital-to-genital contact that occurred in Appellant's bedroom, and the indictment alleged only genital-to-genital contact." *Id.* at ——, 2017 WL 4973823, at *7. "Despite certain varying details, these acts of abuse could reasonably be viewed as a general pattern." *Id.*

Owings concluded that the second *Dixon* factor did not weigh in favor of reversal because the complainant "was either credible or she was not; she described the ongoing, repeated instances of genital-to-genital contact with enough detail to support a finding of guilt." *Id.* "Likewise, we are confident that the State's failure to elect did not result in a non-unanimous verdict." *Id.* "As noted above, the prosecution clearly focused on the same act of genital-to-genital contact that [the complainant] ... said occurred on numerous occasions in Appellant's bedroom." *Id.* "Appellant's defense was that the sexual abuse did not occur at all." *Id.* "There is no basis anywhere in the record for the jury to believe that one incident occurred and another did not." *Id.* "Either they all did or they all did not." *Id.* "We also perceive no risk that Appellant was deprived of adequate notice of which offense to defend against." *Id.* at ——, 2017 WL 4973823, at *8. "Appellant's defense was the same as to each incident [the complainant] ... testified to—that no sexual abuse occurred at all." *Id.*

In reaching these conclusions the court in *Owings* distinguished *Phillips*, 193 S.W.3d at 913. *Phillips* "held that the trial court's error in failing to require the State to elect was harmful constitutional error because the complainant had given more than one detailed account for each type of offense." *Owings*, —— S.W.3d at —— n.20, 2017 WL 4973823, at *7 n.20 (citing *Phillips*, 193 S.W.3d at 907, 914). "Specifically, the purpose that was not satisfied [in *Phillips*] was the one requiring jury unanimity." *Owings*, —— S.W.3d at —— n.20, 2017 WL 4973823, at *7 n.20. "The danger was that six jurors could convict on the basis of one of the detailed incidents and six could convict on the basis of the other detailed incident." *Id.* (citing *Phillips*, 193 S.W.3d at 913).

***12** Applying this teaching, we conclude that harmful error is shown because the circumstances here are much more similar to those in *Phillips* than they are to those in *Owings* or *Dixon*. Unlike *Owings*, this case does not involve evidence of a "general pattern" of genital-to-genital contact "that happened repeatedly in the same way under the same circumstances in the same place." *See also Dixon*, 201 S.W.3d at 735 (No harm shown from failure to elect where the complainant "articulated one sequence of events and merely answered that this sequence happened one hundred times, with all but one of these instances occurring at night. The child was either credible in giving this unified account or she was not.").

In contrast to *Owings* and *Dixon*, this case involves evidence from different witnesses who described two distinct penetrative assaults that occurred under different circumstances at different times in different rooms of different apartments. Here, as in *Phillips*, there is a significant danger that "six jurors could convict on the basis of one of the detailed incidents and six could convict on the basis of the other detailed incident." *See Owings*, —— S.W.3d at —— n.20, 2017 WL 4973823, at *7 n.20 (citing *Phillips*, 193 S.W.3d at 913). That danger is increased by the jury charge, and by closing arguments based on the charge's conflated description of a single penetrative assault as occurring both (1) "while inside a bathroom inside an apartment [complainant] ... shared with her mother, brothers, and the defendant;" and (2) "on or about the 16th day of August, 1987"—a date that corresponds to a separate bedroom incident in another apartment.

CONCLUSION

Having determined that the failure to require an election of which act the State relied upon for conviction at the close of its case-in-chief was harmful error, we reverse the trial court's judgment and remand for a new trial.[2]

All Citations

--- S.W.3d ----, 2017 WL 6374691

Footnotes

1 Complainant testified that other non-penetration assaults continued to occur after this assault, thereby establishing that this assault was not the assault that took place on August 16, 1987. Likewise, the August 16, 1987 bedroom incident took place in the third apartment the family lived at, and when complainant was 12.

2 In a cross-issue, the State requests we reform the judgment. Because we remand for a new trial, we do not reach this issue.

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